

DOCKET FILE COPY ORIGINAL

ORIGINAL  
NOV 20 1995

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
Advanced Television Systems )  
and Their Impact upon the )  
Existing Television Broadcast ) MM Docket No. 87-268  
Service )  
Fourth Further Notice of Proposed )  
Rule Making and Third Notice )  
of Inquiry )

Summary

Abacus Television respectfully submits these comments in response to the Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry, (FCC 95-315) in the above referenced matter. Abacus Television comments on the adverse effects of this proposal on LPTV broadcasters, in particular, on minority LPTV broadcasters.

Abacus Television is a community broadcaster with an interest in the preservation of the Low Power Television ("LPTV") broadcast industry, the continued viability of television translators, and the continued growth of community-based, locally originated programming.

Index

Statement of Standing.....	1
Introduction.....	2
I. Potential Impact of the Commission's ATV Proposal on the Commission's Long Standing Policy of Fostering Programming and Ownership Diversity.....	2
II. Potential Impact of the Commission's ATV Proposal on Small Business and Minority Ownership.....	4
III. Potential Impact of the Commission's ATV Proposal on Existing Broadcasters and Comments on Eligibility Requirements.....	8
IV. Broadcasters Public Service Obligations.....	12
V. Potential Impact on the Commission's Objective of Promoting Localism and Diversity of Viewpoints in a Digital World...	12
VI. As a Matter of Policy, the Commission Should Permit Minorities to Have Access to ATV Spectrum.....	14

No. of Copies rec'd  
List ABCDE

049

VII. The Commission Lacks Any Factual Basis for Its Conclusion that LPTV Cannot be Accommodated.....	17
IIX. Potential Impact of Spectrum Recovery and Creation of Contiguous Blocks of Spectrum on Low Power Television Broadcasters.....	23
IX. How the Commission Can Accommodate LPTV Broadcasters in the Transition to ATV.....	24
Conclusion.....	25

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
Advanced Television Systems	)	
and Their Impact upon the	)	
Existing Television Broadcast	)	MM Docket No. 87-268
Service	)	
	)	
Fourth Further Notice of Proposed	)	
Rule Making and Third Notice	)	
of Inquiry	)	

**COMMENTS OF ABACUS TELEVISION**

Abacus Television ("Abacus") respectfully submits these comments in response to the Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry, FCC 95-315 (Released August 9, 1995) ("4th FNPRM") in the above referenced matter. Abacus Television is the permittee of 12 low power television stations. Two of these stations are currently operating in Greensburg, Pennsylvania (W28AW) and in Jacksonville, Florida (W09CF) pursuant to Special Temporary Authority ("STA").<sup>1</sup> Abacus Television is a community broadcaster with an interest in the preservation of the Low Power Television ("LPTV") broadcast industry, particularly those of minorities in LPTV<sup>2</sup>, the continued viability of television

---

<sup>1</sup> Since there have been no LPTV filing windows in over a year, Abacus has been unable to file for permanent authority for technical modifications necessary to construct its stations. As a temporary expedient, Abacus sought and received a STA to build, consistent with major modifications which will be filed when a chance to file major modifications is next provided by the Commission."

<sup>2</sup> The Commission has defined a minority as a member of the following ethnic categories: African Americans, Hispanics, American Indians, Alaska Natives, and Asians or Pacific Islanders.

translators, and the continued growth of community-based, locally originated programming.

### **Introduction**

Since the inception of the Communications Act of 1934, it has been the intent of the Federal Communications Commission (referred hereinafter as the "Commission") to establish broadcast station ownership patterns that serve the needs and represent the views of the public. One of the basic underlying considerations of the Act of 1934, as amended, was the desire to effectuate policy that discouraged the formation of monopolies in broadcast and effectuate ownership policies that would as a result diversify program content and ownership.

#### **I. POTENTIAL IMPACT OF THE COMMISSION'S ATV PROPOSAL ON THE COMMISSION'S LONG STANDING POLICY OF FOSTERING PROGRAMMING AND OWNERSHIP DIVERSITY.**

It is well established that both the Courts and the Commission have long thought that viewpoint diversity is best achieved through diversifying station ownership. In FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 780 (1978). In setting its licensing policies, the Commission has acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.<sup>3</sup>

The Commission's proposal to exclude LPTV broadcasters from this 4th FNPRM and, in particular, the vast majority of minority

---

<sup>3</sup> See Comments for Mass Media Access Project, in response to Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry, FCC 95-315.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
Advanced Television Systems	)	
and Their Impact upon the	)	
Existing Television Broadcast	)	MM Docket No. 87-268
Service	)	
	)	
Fourth Further Notice of Proposed	)	
Rule Making and Third Notice	)	
of Inquiry	)	

**COMMENTS OF ABACUS TELEVISION**

Abacus Television ("Abacus") respectfully submits these comments in response to the Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry, FCC 95-315 (Released August 9, 1995) ("4th FNPRM") in the above referenced matter. Abacus Television is the permittee of 12 low power television stations. Two of these stations are currently operating in Greensburg, Pennsylvania (W28AW) and in Jacksonville, Florida (W09CF) pursuant to Special Temporary Authority ("STA").<sup>1</sup> Abacus Television is a community broadcaster with an interest in the preservation of the Low Power Television ("LPTV") broadcast industry, particularly those of minorities in LPTV<sup>2</sup>, the continued viability of television

---

<sup>1</sup> Since there have been no LPTV filing windows in over a year, Abacus has been unable to file for permanent authority for technical modifications necessary to construct its stations. As a temporary expedient, Abacus sought and received a STA to build, consistent with major modifications which will be filed when a chance to file major modifications is next provided by the Commission."

<sup>2</sup> The Commission has defined a minority as a member of the following ethnic categories: African Americans, Hispanics, American Indians, Alaska Natives, and Asians or Pacific Islanders.

translators, and the continued growth of community-based, locally originated programming.

**A. Introduction**

Since the inception of the Communications Act of 1934, it has been the intent of the Federal Communications Commission (referred hereinafter as the "Commission") to establish broadcast station ownership patterns that serve the needs and represent the views of the public. One of the basic underlying considerations of the Act of 1934, as amended, was the desire to effectuate policy that discouraged the formation of monopolies in broadcast and effectuate ownership policies that would as a result diversify program content and ownership.

**I. POTENTIAL IMPACT OF THE COMMISSION'S ATV PROPOSAL ON THE COMMISSION'S LONG STANDING POLICY OF FOSTERING PROGRAMMING AND OWNERSHIP DIVERSITY.**

It is well established that both the Courts and the Commission have long thought that viewpoint diversity is best achieved through diversifying station ownership. In FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 780 (1978). In setting its licensing policies, the Commission has acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.<sup>3</sup>

The Commission's proposal to exclude LPTV broadcasters from this 4th FNPRM and, in particular, the vast majority of minority

---

<sup>3</sup> See Comments for Mass Media Access Project, in response to Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry, FCC 95-315.

television licensee and permittee holders, is antithetical to increasing diversity of ownership and, thereby, diversity of voices, violating First Amendment principles. As the Supreme Court has stated:

Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission. We have observed that "the public interest" standard necessarily invites reference to First Amendment principles," ... and that the Communications Act of 1934 has designated broadcasters as "fiduciaries for the public."<sup>4</sup>

In response to the Commission's request for comments on the potential of the ATV implementation plans on the Commission's policy of fostering programming and ownership diversity, Abacus seeks to focus its comments on the adverse effects of the policies set forth in this 4th FNPRM on minority permittees and/or licensees of low power television service, many of whom are currently operating successful television broadcast stations throughout the United States. The effects addressed by this Commentor are a result of the Commission's decision to exclude low power television broadcasters from this important rulemaking and thus continue to maintain the LPTV's industry secondary status in television broadcasting (and assure the early demise of this vibrant new industry).

Abacus Television has recently compiled the only compilation of the existing minority-owned low power television broadcasters in

---

<sup>4</sup> Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 567 (1990). Also see comments for Media Access Project, p. 5.

the United States.<sup>5</sup> We have found 126 minority low power television broadcasters, which own a total of 97 construction permits and 148 licenses for this service. Hispanic ownership in LPTV service is highest of all FCC designated minority groups. Native American ownership was the second largest group owner, followed by African Americans, and lastly Asian. Our findings show that Hispanics own a total of 65 construction permits and 79 licenses; Native Americans own six construction permits and 37 licenses; African Americans own 19 construction permits and 26 licenses, and Asians own 7 construction permits and 6 licenses.<sup>6</sup>

## **II. POTENTIAL IMPACT OF THE COMMISSION'S ATV PROPOSAL ON SMALL BUSINESS AND MINORITY OWNERSHIP**

Throughout the creation of the diversity policies for television broadcast service, the Commission adhered to the principle that diversification better serves the needs of the public at large.<sup>7</sup> The justification for the Commission's commitment to fostering minority ownership and control has been clearly established. In TV 9, Inc. v. FCC, the U.S. Court of Appeals for the District of Columbia Circuit held that minority ownership and participation in station management is in the public

---

<sup>5</sup> Data was compiled from telephone surveys of LPTV broadcasters, from Broadcasting and Cable, 1995 Yearbook, and the Commission's October, 1995 Fair Report of LPTV construction permits and licenses. Please refer to appendix found at the end of this document.

<sup>6</sup>Ibid.

<sup>7</sup> Similarly, the Commission has sought to ensure the diversity of ownership in newer auction-based services, including PCS, MMDS, IVDS, and 900 MHz SMR.



interest, since it would inevitably increase diversification of control of the media and thus be expected to increase the diversity of program content.

Furthermore, in commenting on the TV 9, Inc. case, the Court of Appeals, in Garret v. FCC<sup>8</sup> stated: "the entire thrust of TV 9 is that Black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the Black citizenry, and that reasonable expectation without advance demonstration "gives them relevance."<sup>9</sup> The Commission then firmly stated that the vitality of the U.S. system of broadcasting depended largely on a diversified ownership and, hence, diversification of programming and service content.

The low power television<sup>10</sup> medium is a niche broadcasting service with an established track record of providing specialized programming to specialized markets, particularly underserved and ethnic communities. Exclusion of LPTV service from this 4th FNPRM in the initial distribution of ATV channels is tantamount to stating that the Commission is not adopting its standard of

---

<sup>8</sup> 513 F. 2d 1056, 1063 (D.C. Cir 1975)

<sup>9</sup> See comments for Media Access Project in response to 4th FNPRM, page 5.

<sup>10</sup> Low power television service was established by the Commission in 1982. It was primarily intended to provide opportunities for locally-based television service in small communities, both rural and individual communities within larger urban areas. LPTV presents a less capital intensive and very flexible means of delivering programming tailored to the viewers in small localized areas, providing a vehicle for local self-expression. Report and Recommendations in the Low Power Television Inquiry, BC Docket No. 78-253.

diversity in ownership and hence diversification of programming and service content in the next generation of broadcast ownership.

According to industry experts<sup>11</sup>, approximately 42% of LPTV stations provide the public with programming for special demographic populations, reflecting fulfillment of the Commission's initial goal when it established LPTV service in 1983.<sup>12</sup>

LPTV stations on the air in the U.S. now number 1761 stations.<sup>13</sup> The present LPTV figure of licensed stations comprises 1201 UHF<sup>14</sup> and 560 VHF stations, compared to the nation's full

---

<sup>11</sup> Please refer to the LPTV study of Dr. Mark J. Banks, Associate Professor, Slippery Rock University, Community Television Business, Volume 2, No. 2., January 30, 1995. A copy of Professor Bank's study has been submitted this date as an "Appendix" to the Comments of John Kompas and Jackie Biel, KB Limited to this 4th FNPRM.

<sup>12</sup> Today there are more than 1,600 licensed and operating LPTV stations, 250 of which are part of a state-wide network in Alaska. In the lower 48 states, approximately 1,300 stations are operated by 700 licensees in nearly 550 towns and cities, ranging in population from on a few hundreds to the millions. About two-thirds of the stations serve rural communities. Further, an additional 6,000 TV translator stations rebroadcast the signals of full power service television stations, mostly in the western mountainous states. Consumer Assistance and Small Business Division, Office of Public Affairs, The Federal Communications Commission.

<sup>13</sup> Figures were released by the Commission on October 6, 1995 totaling broadcast stations licensed in the United States as of September 30, 1995. The Federal Communications Commission, News, mimeo number 60072, October 6, 1995.

In September, 1990, there were only 868 licensed stations, so in approximately five years there has been a doubling in the number of licensed LPTV broadcasters.

<sup>14</sup> The LPTV services is particularly active in the upper half of the UHF band. When the service was first proposed by the Commission in 1980, there were only three full power stations in the entire upper half of the UHF band, so the LPTV service was given an opportunity to make use of this spectrum. It is

power commercial and educational stations which now number 1,542 stations.<sup>15</sup> Also, minority ownership in LPTV is higher than minority ownership in full power television service. Currently there are only 31 licensed full power television stations owned by minorities compared to more than 148 licensed LPTV stations and 97 LPTV stations authorized under construction permits, all owned by minorities. This means that more than 10.7 percent of LPTV stations are licensed to ethnic minority groups or individuals compared to the 2.6 percent stations licensed to minorities in full power television service.

Not only is the percentage of minority ownership in the LPTV industry over four times the level in the full power television industry, the level of minority ownership in LPTV exceeds the percentage ownership levels of both AM and FM radio by a comparable margin. In fact, no segment of the telecommunications industry enjoys the representative level of minority participation that the LPTV industry has achieved. That is why the Commission's proposal to extinguish the LPTV industry by denying these broadcasters a guaranteed migration path into the future digital world is crassly inconsistent with the Commission's often stated desire to ensure

---

especially ironic that now, after the LPTV industry has made extensive use of this spectrum to bring local programming services to hundreds of medium size cities and underserved ethnic groups ( in fact, saturating the band in most large cities) that the Commission proposes to ignore 1,600 stations and the services they provide and give this heavily occupied spectrum to the very industry that previously ignored its potential for serving the public good.

<sup>15</sup> Ibid.

minority participation in the future of telecommunications.

Furthermore, because over 10% of the outstanding LPTV construction permits are minority owned, the destruction of the LPTV industry before these additional stations can be built, will destroy an additional 100 minority owned television stations before they can even be built. The LPTV industry has been growing rapidly since its inception, including over 100 new licensed facilities in the past year alone. In contrast only a couple of full power television stations achieved license status in the last year, the number of AM stations declined, and FM radio grew only as much as LPTV, but has a far lower minority participation level. As a result, most of the growth in minority broadcast ownership in the last 12 months came from the LPTV industry.

Despite the growth in ownership in the LPTV industry and the fact that LPTV broadcasters have made great efforts in the last three years to acquaint the Commissioners with: i) the unique and diverse services that LPTV provides to the public; and, ii) the record of successes that the LPTV industry has achieved with the Commission's stated goals of providing universal, over-the-air television service, the 4th FNPRM has excluded low power broadcasters from any consideration in the ATV transition plan and the ATV allotment proposal.

### **III. POTENTIAL IMPACT OF THE COMMISSION'S ATV PROPOSAL ON EXISTING BROADCASTERS AND COMMENTS ON ELIGIBILITY REQUIREMENTS**

Abacus is clear about the increased range of new service capabilities that digital technology will bring to television, as

well as the capability to deliver multiple program streams over one 6 MHz channel that the conversion to digital will bring, but reasons that these promised new services do not justify exclusion of LPTV broadcasters from guaranteed conversion channels. The Commission has stated that its initial reason for exclusion of LPTV service from this 4th FNPRM to be that the broader public interest would be best served by limiting initial channel allocation to existing eligible "broadcasters."<sup>16</sup>

This conclusion "is warranted," as the Commission claims, because of "the shortage of spectrum and our decision not to allocate additional spectrum for this purpose,"<sup>17</sup> Further, the Commission asserts that because it will require broadcasters to return one of its two blocks of spectrum, it is neither, "creating a new service" nor giving "more spectrum for broadcasters and less spectrum for others."<sup>18</sup> Instead, "it claims that it is engaging in "reallocation" of spectrum.<sup>19</sup> If the Commission is simply reallocating spectrum, how is it possible that the Commission can reallocate spectrum that has been already usefully occupied to over 1,600 LPTV broadcasters?

---

<sup>16</sup> "Broadcasting" is exactly and exclusively what the 1650+ LPTV stations do, in many cases, to a greater extent than our full power television broadcasters, often as the only locally originated television service, often with more local programming, and often serving demographic groups largely ignored by full power television licensees.

<sup>17</sup> 4th FNPRM at para. 27.

<sup>18</sup> Comments Media Access Project for 4th FNPRM, FCC 95-315, p. 3., see also 4th FNPRM at page 28 and 30.

<sup>19</sup> Ibid, at n. 30.

Considering that during the initial drafting of the allocation table, it was unknown to the Commission that digital transmission would allow much closer separations than traditional analog broadcast, or that there would be far more allotment possibilities if purely digital modulation was used for the transmission of HDTV pictures. All-digital ATV now being the case, there is no longer any rational justification to continue to be excluded LPTV broadcasters from the benefits of ATV.<sup>20</sup>

If it is true that the television broadcast industry is expecting digital television to bring, among other services, multiple streams of standard definition television programming, up to ten programs per channel; and non-broadcast uses that are non-video and/or subscription based in nature, in addition to high definition television pictures, what are the reasons for excluding LPTV broadcasters from these services? The Commission long espoused: (i) the need to protect small business, (ii) the inclusion of minorities in telecommunications, and (iii) the desirability of experimentation. To exclude LPTV from the ATV proceeding is to say that the Commission no longer will adhere to these principles.

The Office of Engineering and Technology's computer program should be re-programmed in a way that it runs with LPTV stations in

---

<sup>20</sup> Of course, the 1,500 full power licensees may not welcome the additional competition which would result from there being twice as many television licensees being initially eligible for conversion channels, but the Commission, of late, has seen competition as a positive outcome of its policies and not a detriment to the public interest.

the database of occupied channels that must be protected to accurately determine whether it is necessary to displace LPTV service, because of the lack of spectrum for the needs of full power television broadcasters. If the plan now is to reserve enough spectrum to accommodate full power television broadcast channels in the most congested markets, according to industry experts, most markets will nevertheless have enough spectrum to accommodate LPTV channels as well.

The regulatory provisions of low power television include that: 1) LPTV stations may not cause interference to the over-the-air reception of existing full power service television stations; 2) must accept interference from full power television stations; 3) must yield to increase in facilities of existing full power television stations; and 4) must yield to new full power television service where interference occurs, what analysis has the Commission performed to support a public interest finding that this secondary status should continue vis-a-vis new ATV allotment, or altogether new UHF Services? Since these regulatory provisions were enacted before ATV these short answer is that the Commission has never gathered a factual record with which to perform a reasoned analysis of this public interest question. If the Commission is wrestling with the idea of whether to require all full power television broadcasters to broadcast in high definition television, or to allow them to use their second channel for some other uses, Abacus would like LPTV service to be eligible to provide these ancillary services. After all, the minority broadcasters in the LPTV service

should have equal access to spectrum which is publicly owned.

#### **IV. BROADCASTERS PUBLIC SERVICE OBLIGATIONS**

In compliance with the Commission's principles of diversification of ownership, and universal service<sup>21</sup> and the U.S. Constitution, any eligibility criteria used to develop an allotment table should be readily and equally available to all broadcasters and the diverse audiences they serve, not just full power broadcasters. To exclude LPTV broadcasters from the ATV proceeding is to say that the Commission does not believe in its long stated standard that the interests of all Americans be served by the continued reception of free, over-the-air television. The Commission "as it is mandated by law, must now bring the spot light on the needs of the public - its need (and right) to have access to diverse sources of information, to be adequately compensated with enhanced public service, and to be assured universal access to free, over-the-air television."<sup>22</sup>

#### **V. POTENTIAL IMPACT ON THE COMMISSION'S OBJECTIVE OF PROMOTING LOCALISM AND DIVERSITY OF VIEWPOINTS IN A DIGITAL WORLD**

The Commission should continue to value localism in an era of megamergers. LPTV is one of the few remaining services that

---

<sup>21</sup> Six Report and Order, in Docket No. 8736, 1952. See CFR, Section 73.606(b).

<sup>22</sup> See Comments of the Media Access Project, in response to 4th FNPRM.



focuses on local content. It is the local programming of low power television broadcasters that brings services and programming to the underserved and ethnic communities throughout the U.S. These services include running: Public Service Announcement for local government elections as well as for local service organizations, weather emergency training, AIDS related prevention announcements, and many other public interest programs.<sup>23</sup>

One of the Commission's goals in inaugurating LPTV service was to bring local programming to communities that had never been served or had been underserved by full power television. Equally as important, however, was the desire to increase diversity in ownership in television broadcasting among women and minorities, since ownership of minorities in full power television was and continues to be lower than that of non-minorities.<sup>24</sup>

LPTV created opportunities for new entry into television broadcasting, in particular for minorities. In 1982, Congress added Section 309 (i)(3)(A) to the Communications Act, which directs the Commission to increase the diversity of broadcast ownership by according preferences to industry newcomers, particularly minority applicants, participating in lotteries to award certain broadcast

---

<sup>23</sup> In over 50 individual sets of comments in response to the 4th FNPRM, LPTV licensees have submitted descriptions of their public interest oriented activities. These comments provide a thorough record on which to base its assessment of the importance of the LPTV service to the public.

<sup>24</sup> In the late 1980's, minorities roughly 12.5% of the U.S., but owned less than 1% of television station licenses, a disparity of 10:1. Since then, minority television licensees have increased to 2%, but minorities now make up over 25% of the U.S. population, so the 10:1 disparity still largely exists.

licenses. LPTV was the only broadcast service in which the Fowler Commission decided to use its lottery-with-minority-preference authority.<sup>25</sup> As a result, the percentage of minority construction permit "winners" is higher in the LPTV service than in any of the other broadcast services.<sup>26</sup>

**VI. AS A MATTER OF POLICY, THE COMMISSION SHOULD PERMIT MINORITIES TO HAVE ACCESS TO ATV SPECTRUM**

As stated by Chairman Reed Hundt, in his speech at the National Association of Black Owned Broadcasters ("NABOB"), on September 22, 1995, entitled *Same Flight, New Battles*, "we ought to be concerned right now with all of the following: how can small businesses, and especially minority-owned small businesses, participate in the telecommunications revolution?" This query can be effectively addressed by including LPTV broadcasters in the ATV conversion process, and thereby not destroying the vast majority of minority-owned television stations and minority licensees.

If it is true that the FCC's commitment to minority ownership is in jeopardy because of: (i) industry consolidation, (ii) Congress' provisions to remove ownership limits in radio and barriers to cross-ownership, and (iii) the U.S. Supreme's Court decision in the Adarand case, the FCC can compensate for this retrogression and encourage the participation of small and minority-owned businesses in the communications industries, particularly in

---

<sup>25</sup> There are 102 construction permits owned by minority licenses. Thus, if the Commission does not kill it first, the LPTV industry has the potential of creating 245 minority licenses -- far more than FM radio, AM radio, PCS, IVDS, and MDDS services.

<sup>26</sup> Report and Order, MM Docket 83-1350.

ownership of mass media, by addressing the needs of the vast majority of minority LPTV broadcasters and include LPTV broadcasters in this 4th FNPRM. It is, after all, in this segment of broadcasting that the vast number of minority broadcasters exist.<sup>27</sup>

If we briefly look at the diverse policies enacted by the Commission to encourage minority ownership, we can note that these policies have been somewhat successful in increasing minority ownership in broadcasting. In 1978, the Commission's Minority Ownership Task Force reported that although minorities constituted approximately 20 percent of the population, they controlled fewer than one percent of the 8,500 commercial radio and television stations then operating in the United States.

Consequently, the Commission issued a policy statement in which it determined that it would grant a tax certificate to licenses that assign or transfer control of their authorizations. Although the Commission's tax certificate policy was slightly successful in addressing the underrepresentation of minorities in the ownership of broadcast facilities, this policy was repealed by Congress in April, 1995.

The current relaxation of the multiple ownership and duopoly rules in broadcasting and the possibility of eliminating ownership caps at both a local and national level in an industry marked by a rapid rate of consolidation, will certainly hurt the participation

---

<sup>27</sup> Please refer to appendix in which all minority LPTV broadcaster in the United States are listed by ethnic composition.

of minority broadcasters in television. Many industry experts have stated and seek to demonstrate that consolidation within the broadcasting industry negatively affects minority ownership. The primary reason lies in the fact that the vast majority of minority broadcasters do not have the access to the means necessary to consolidate (such as capital and access to financing) and do not benefit from the economies of scale that go along with duopoly ownership.

With all of the above stated, and the Courts present race-based affirmative action programs subject to strict scrutiny in the U.S. Supreme Court case Adarand v. Peña<sup>28</sup>, including LPTV service and its vast number of minority broadcasters in 4th FNPRM will allow the Commission to show its commitment to small business and minorities as "the communications revolution unfolds."<sup>29</sup> Giving each minority LPTV authorization holder a primary ATV simulcast channel license will increase the number of minority licensee from 31 to 165 with that single Commission action; a 532% increase. Nothing the Commission has done to date has had a positive an impact as including LPTV in the conversion to ATV would have.

If the Commission's concern, "should be for all members of the public -- including small businesses, minorities and children"<sup>30</sup>

---

<sup>28</sup> 63 USLW 4523, 4529-4531 (1995).

<sup>29</sup> From Chairman Reed Hundt's Speech at NABOB, September, 1995.

<sup>30</sup> The Federal Communication's Commission Chairman Reed Hundt's speech at the National Association of Black Owned Broadcasters Convention, September 22, 1995, entitled, "Same Flight, New Battles."

then by excluding LPTV broadcasters from the conversion process to ATV from analog service, the Commission, is "de facto" eliminating minority ownership and violating the First Amendment rights of minority broadcasters and the audiences they serve.

**VII. THE COMMISSION LACKS ANY FACTUAL BASIS FOR ITS CONCLUSION THAT LPTV CANNOT BE ACCOMMODATED**

Abacus is acutely aware that the rulemaking process on ATV is well advanced. In particular, the Commission's Engineering Bureau has already performed extensive analysis of how to accommodate the estimated 1,500 full power television licensee's simulcast channels. Unfortunately, this analysis was grossly premature, since the Commission has not yet adopted either ATV encoding or modulation standards. To make matters worse, most of the early Commission analysis was completed using planning factors that protected a variety of ATV algorithms, including the remaining analog proposals, which resulted in greatly exaggerated protection interference requirements.

Even the Commission's more recent efforts, which recognized the narrowing of the number of competing formats to digital-only proposals, was largely performed before the adoption of the single "Grand Alliance" ATV standard and therefore, of necessity, protected characteristic of modulation schemes that are no longer under consideration.<sup>31</sup>

---

<sup>31</sup> OET has continued to receive up date from the full power broadcaster dominated Advisory Committee on ATV, Maximum Service Telecasters, NAB, NCTA, etc. Reliance on planning factors espoused by the parties -- all of whom have strong economic motives to want LPTV eliminated -- necessarily results in a self-serving, one-sided and therefore spectrally inefficient analysis.

The Commission has not performed the market-by-market analysis needed to determine which LPTV stations could be accommodated. It would be an obvious error, as well as arbitrary and capricious, to conclude that an LPTV licensee in, for example, Salt Lake City, Utah, cannot be protected and given a channel, because there are too few channels to accommodate every LPTV licensee in, for example, Washington, D.C. Yet, to date, this is exactly the level of explanation the Commission has used to justify its failure to perform the analysis needed to generate accurate facts.

It is obvious that two or three LPTV licenses in geographically isolated cities such as Salt Lake City, Utah; Denver, Colorado; Phoenix, Arizona, and other cities in the central United States and Alaska can easily be both protected from unnecessary displacement by the initial ATV allotments to full power broadcasters and given an ATV channel of their own on which to convert to digital formats. It is even more obvious that the hundred of LPTV stations, more than 75 miles from the center of the 50 largest urbanized areas need not be displaced or denied simulcast channels at all. Yet this is exactly what the Commission has continued to suggest. These broadcasters are targeted to be forced out of existence only because the Commission has not yet seen fit to actually analyze the question of accommodating the LPTV service, before it adopts a Table of ATV allotment.

If political realities and economic pressure mandate Commission action in this proceeding before the Commission has completed its analysis of the effect of the ATV conversion process

on the 50+ percent television industry that contains the most of the small business, the minority-owned licensees, permittees, and the most ethnic broadcast services, the Commission could still minimize the amount of unnecessary damage to the public by adding a second phase to the Table of Allotment design process to address the accommodation of the LPTV service next, after it has begun the conversion process for full power television licenses.

Under this proposal the Commission would proceed to adopt its "Full Power Table of Allotments," with the proviso that ATV channel falling on top existing LPTV authorizations would be subject to later revision if an acceptable substantial channel is identified during the development of the "Low Power Television Table of Allotment." Then, during the six-month full power ATV application period the Commission could perform the analysis necessary to adopt a supplementary table that specifies ATV conversion channel for as many LPTV stations as is spectrally feasible.

The LPTV allotment table would provide spectrum for LPTV conversion to digital only if every existing full power licensee and permittee has been accommodated.<sup>32</sup>

Least the Commission fear inclusion of the LPTV service in its conversion to digital television plans will create an impossible to satisfy demand for digital television allotments, Abacus here

---

<sup>32</sup> It is inconceivable that it would be in the public interest to displace or destroy an existing LPTV television service to accommodate allotments for not yet authorized full power authorizations. Thus the prioritization in crowded markets would be (1) full power licensees and permittees; (2) LPTV licensees and permittees; (3) full power applicants; (4) low power applicants; and (5) channel pairs for vacant allotments.

addressed some issues raised by revision of the 4th FNPRM to provide for the continuation of LPTV service.

I. As indicated earlier, with the exception of perhaps ten locations, there is enough spectrum in the UHF band to provide reasonably interference free service area of a reasonable size to all LPTV licensees as well as all full power station licensees. Of course, a spectrum shortage can be manufactured by insisting that each full power licensee be afforded a 75 or 100 mile wide service radius and that the entire area of each full power licensee be 100% interference free, but the cost of this manufactured spectrum shortage is a significantly reduce number of usable channels. The Commission should not reinstate the rejected methodology of AM clear channels a few super stations with broad regional service areas - at the expense of a larger number of local outlets capable of addressing local needs. Selection of reasonable service areas, with something less than a perfect picture 100% of the in 100% of the locations time will represent a better balance between the natural desire of the full power licensee to seize larger and larger coverage areas, and the need to provide the largest number of communities with a full complement of local broadcast outlets (for example, six networks, one non-commercial, one religious, one shopping on Spanish language and four LPTV's, for a total of fourteen).<sup>33</sup>

---

<sup>33</sup> The Commission recently concluded that 35-miles was a reasonable service area for wireless cable systems. Thirty-five miles is also the long used standard for cable carriage, syndication exclusivity and copyright considerations.



II. If giving each full and low power station the same service radius proves spectrally impractical, a tiered system of allotments much like the system of Class C, Class B and Class A, FM allotments could be used to dramatically increase the overall number of allotments in spectrally crowded areas. For example, a full power commercial station could be scheduled for 70-mile service area, a full power non-commercial a 35-mile service area, and LPTV stations a 17.5-mile service area. To the extent there are not enough full sized allotments to give everyone their due, the next allotment size down would be awarded. Then, after a 3-year build out period, any licensee given a Class B (35 mile) or Class A (17.5 mile) allotment could file for upgrades onto channels not timely built-out by other licensees.

III. To the extent these digital broadcasting channels are actually going to be used primarily for multi-channel transmission, in spectrally crowded areas it may be better public policy to give each licensee less than 6 MHz, rather than excluding some existing broadcasters. For example, if there are 10 existing stations (i.e. 7 full power and 3 low power licenses or permits) in an area, but only six "usable" channels, the Commission could simply award each of the ten licensees 3.6 MHz for digital spectrum (enough for perhaps three to six standard definition program feeds) rather than creating six haves (with up to 10 program feeds each) and four have-nots.

IV. The Commission has extensive experience assigning

---

Also see 47 U.S.C., 307 (b).